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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

FRANCISCO ALEX MARTINEZ,

Petitioner,

v.

APPELLATE DIVISION OF THE
SUPERIOR COURT OF ORANGE
COUNTY,

Respondent;

THE PEOPLE OF THE STATE OF
CALIFORNIA,

Real Party in Interest.

G058334

(Super. Ct. Nos. 30-2018-00971041,
16NM10596)

O P I N I O N

Original proceedings; petition for a writ of mandate/habeas corpus to challenge an order of the Superior Court of Orange County, Terri K. Flynn-Peister, Nathan Scott and Gregg L. Prickett, Judges. Petition denied.

Sharon Petrosino, Public Defender, Sarah Ross, Assistant Public Defender,
Richard S. Cheung, Deputy Public Defender, for Petitioner.

No appearance for Respondent.

Todd Spitzer, District Attorney, and David R. Gallivan, Deputy District
Attorney, for Real Party in Interest.

* * *

After petitioner Francisco Alex Martinez was convicted of misdemeanor identity theft (Pen. Code, § 530.5, subd. (c)(1); count 2) and placed on probation, he appealed.¹ While his appeal was pending in the superior court appellate division (appellate division), Martinez returned to the trial court and moved for dismissal of his conviction under sections 1118.1 and 1385. The trial court granted his motion. But the appellate division, the respondent court, concluded the trial court lacked jurisdiction to dismiss the case while Martinez's appeal was pending and ordered the trial court to vacate the dismissal order.

Martinez petitioned this court for a writ of mandate or habeas corpus, requesting we order the appellate division to vacate its order so that the trial court's dismissal could be reinstated. He raises two issues in his petition: (1) whether the trial court retained jurisdiction to grant a motion to dismiss under section 1385 after his notice of appeal had been filed; and (2) whether it was unfair to return him to probation after his conviction had been dismissed for one year. We conclude the appellate division correctly ordered the trial court to vacate its dismissal order because the trial court lacked jurisdiction to dismiss the case while Martinez's appeal was pending. We further

¹ All further statutory references are to the Penal Code unless otherwise stated.

conclude the reinstatement of Martinez's conviction and probation was not an unfair result. Accordingly, we deny Martinez's petition for writ relief.

FACTUAL AND PROCEDURAL HISTORY

The appellate division opinion summarized Martinez's offense as follows: "On May 30, 2016, Officer Nelson searched [Martinez] and found six debit and credit cards belonging to other people. He then searched [Martinez]'s vehicle and located blank gift cards and a work identification for another individual."

Martinez was charged with petty theft of lost property (§ 485; count 1) and misdemeanor identity theft (§ 530.5, subd. (c)(1); count 2). Following a jury trial before Judge Ronald Kreber, Martinez was convicted of identity theft² and placed on informal probation for three years. As a condition of his probation, Martinez was ordered to complete 30 days of CalTrans in lieu of 180 days in jail; a compliance date was set for December 24, 2018.

Martinez appealed, and the public defender's office was appointed to represent him in his appeal. In the appellate division, Martinez filed a motion to augment the record with a motion for judgment of acquittal (§ 1118.1) and to dismiss (§ 1385) that he contended had been denied by the trial court. The appellate division granted the motion to augment and remanded the matter "to permit the trial court and the parties to determine whether the motion to dismiss . . . was considered by the trial court." At a subsequent hearing, in the absence of the parties, Judge Andre Manssourian confirmed the motion was considered and denied during the trial by Judge Kreber; Judge Manssourian forwarded his conclusion to the appellate division on May 31, 2018.

²

The court declared a mistrial as to count 1 and dismissed the charge.

A few months later, in August 2018, while Martinez's appeal was still pending, Judge Manssourian granted the defense's oral motion for dismissal under sections 1118.1 and 1385.

In October 2018, Martinez filed his opening brief in his appeal, raising two issues: (1) the trial court erred by admitting evidence of a prior uncharged act; and (2) the trial court erred by denying his section 1118.1 motion for judgment of acquittal.

Two months later, the case was called before Judge Craig Arthur for proof of completion of the CalTrans probation condition. Martinez was not present in court, and a bench warrant was issued and held. After realizing the case had been dismissed in August 2018, Judge Arthur ordered the bench warrant quashed In January 2019. Judge Arthur made a nunc pro tunc entry in the court minutes for the August 2018 hearing before Judge Manssourian, stating the "[d]efense motion for judgment of acquittal as to count(s) 2 pursuant to Penal Code section 1118.1 is granted." The minutes do not indicate the court granted the motion to dismiss under section 1385.

In July 2019, a hearing was held before the appellate division on Martinez's appeal. The appellate division then requested the parties to submit supplemental briefs addressing whether the trial court had jurisdiction to grant Martinez's motion while his appeal was pending. Martinez filed a supplemental brief contending the trial court had jurisdiction to grant his motion to dismiss under section 1385 because he was on probation at the time of the dismissal. The appellate division concluded otherwise, ruling the trial court lacked jurisdiction "to enter a judgment contrary to the judgment on appeal, then dismiss the case while the appeal was still pending." The appellate division ordered the trial court to vacate the order granting Martinez's motions and the judgment of dismissal.

Martinez then petitioned for a writ of mandate or habeas corpus in this court, seeking an order directing the appellate division to vacate its order. We summarily

denied the petition. Martinez then petitioned the California Supreme Court for review of our denial.

While Martinez's petition for review was pending in the Supreme Court, the appellate division issued its opinion in his appeal and affirmed the judgment. The appellate division rejected both of Martinez's appellate arguments, and as relevant here, concluded the trial court properly denied his section 1118.1 motion during the trial.

The Supreme Court granted review and transferred the matter to this court with directions to vacate the order denying mandate and to issue a new order directing the superior court to show cause why the relief sought in the petition should not be granted. We complied, and the Orange County District Attorney's Office, real party in interest, filed a return and Martinez filed a reply.

DISCUSSION

The trial court lacked jurisdiction to dismiss Martinez's case while his appeal was pending.

Martinez contends the trial court retained jurisdiction to dismiss his case under section 1385 while his appeal was pending because he was on probation. He asserts the appellate division therefore erred by ordering the trial court to vacate its judgment of dismissal. The ground upon which the trial court dismissed Martinez's case is not clear from the record we have been provided. The parties (Martinez and real party in interest) agree Judge Manssourian dismissed the case on August 1, 2018, based on Martinez's oral motion for dismissal under sections 1118.1 and 1385. The record indicates that a nunc pro tunc entry was made on January 9, 2019, by Judge Arthur to indicate the defense motion was granted under section 1118.1, and section 1385 is not listed as a ground. But we have not been provided a transcript of the hearing before Judge Manssourian when Martinez's motion was granted nor have the parties offered any

explanation why Judge Arthur made a nunc pro tunc entry five months later concerning Judge Manssourian's dismissal order.

Regardless, Martinez implicitly concedes that after his notice of appeal was filed, the court did not have jurisdiction to grant his motion for judgment of acquittal under section 1118.1, as he instead singularly argues the court had jurisdiction to dismiss the case under section 1385. Accordingly, we, too, will focus on the trial court's jurisdiction to dismiss under section 1385 while Martinez's appeal was pending.

Generally, "[t]he filing of a valid notice of appeal vests jurisdiction of the cause in the appellate court until determination of the appeal and issuance of the remittitur" (*People v. Perez* (1979) 23 Cal.3d 545, 554) and "divests the trial court of subject matter jurisdiction." (*People v. Nelms* (2008) 165 Cal.App.4th 1465, 1471 (*Nelms*); accord, *People v. Cunningham* (2001) 25 Cal.4th 926, 1044 ["an appeal from an order in a criminal case removes the subject matter of that order from the jurisdiction of the trial court"].) While an appeal is pending, "the court lacks jurisdiction to vacate the judgment or make any order affecting it" and any such "action by the trial court while the appeal is pending is null and void." (*Nelms*, at p. 1471.)

"Jurisdiction survives, however, where provided by statute." (*People v. Flores* (2003) 30 Cal.4th 1059, 1064.) Established exceptions to the general rule provide that a trial court retains jurisdiction to correct clerical errors (*In re Candelario* (1970) 3 Cal.3d 702, 705; *People v. Alanis* (2008) 158 Cal.App.4th 1467, 1473), correct an unauthorized sentence (*People v. Cunningham, supra*, 25 Cal.4th at p. 1044), vacate a void judgment (*People v. Malveaux* (1996) 50 Cal.App.4th 1425, 1434), correct errors in the calculation of presentence custody credits (§ 1237.1; *People v. Acosta* (1996) 48 Cal.App.4th 411, 427-428), and recall a defendant's sentence and resentence the defendant within 120 days of commitment (§ 1170, subd. (d); *Dix v. Superior Court* (1991) 53 Cal.3d 442, 455-456). While an appeal is pending, the trial court has jurisdiction to consider a petition for writ of habeas corpus "so long as the exercise of that

jurisdiction does not “interfere with the appellate jurisdiction” in the pending matter.” (*People v. Scarbrough* (2015) 240 Cal.App.4th 916, 924.) Moreover, “during the pendency of an appeal . . . the trial court ‘retains certain powers over the parties and incidental aspects of the cause’” (*Townsel v. Superior Court* (1999) 20 Cal.4th 1084, 1090.)

Martinez does not rely on any of these established exceptions. Instead, he attempts to create a new one, contending a court retains jurisdiction to dismiss an action under section 1385 during a defendant’s probationary term even after a notice of appeal has been filed. To support his contention, Martinez relies on *People v. Chavez* (2018) 4 Cal.5th 771 (*Chavez*), a relatively recent California Supreme Court decision, which considers whether a trial court has the power to dismiss an action under section 1385 years after the defendant completed his probation.

In *Chavez*, the defendant had been placed on probation after pleading guilty to two offenses. Nearly four years after successfully completing his probation, Chavez filed a motion asking the trial court to dismiss his convictions under section 1385. (*Chavez, supra*, 4 Cal.5th at p. 777.) The Supreme Court held “a trial court exceeds the authority conferred by section 1385 when it dismisses an action after the probation period expires.” (*Ibid.*) In reaching this holding, the *Chavez* court discussed a court’s authority to dismiss an action under section 1385 while a defendant is on probation. In its analysis, the *Chavez* court noted that “[d]uring the probation period, the court retains the power” under section 1203.3 to revoke or modify the terms of probation and under section 1203.2 to terminate probation and sentence the defendant to imprisonment. (*Chavez*, at p. 782.) The Supreme Court determined the court’s power to dismiss under section 1385 during the probation period was consistent with the “court’s power to punish the defendant” during this same period (*Chavez*, at p. 782) but these powers run out when the probation term ends (*id.* at pp. 783-784).

Martinez latches on to *Chavez*'s discussion of a court's authority to dismiss an action under section 1385 while a defendant is on probation, and he asserts that despite his pending notice of appeal, the court retained the ability to dismiss his case under section 1385 because he was on probation. We question whether *Chavez* has any application to the issue before us because *Chavez* did not discuss a court's ability to dismiss a case under section 1385 while an appeal is pending. (*People v. Alvarez* (2002) 27 Cal.4th 1161, 1176 ["it is axiomatic that cases are not authority for propositions not considered"].) In *Chavez*, the trial court retained jurisdiction to dismiss the case under section 1385 while the defendant was on probation because no appeal was filed while the defendant was on probation. Nothing in *Chavez* suggests that section 1385 is an exception to the general rule that the filing of a notice of appeal divests the trial court of jurisdiction.

Martinez's contention—that a trial court retains jurisdiction to dismiss a case under section 1385 while an appeal is pending if the defendant is on probation—is antithetical to the fundamental purpose of the trial and appellate court jurisdictional rule. “The purpose of the rule depriving the trial court of jurisdiction in a case during a pending appeal is to protect the appellate court's jurisdiction by preserving the status quo until the appeal is decided. The rule prevents the trial court from rendering an appeal futile by altering the appealed judgment . . . by conducting other proceedings that may affect it.” (*Townsel v. Superior Court*, *supra*, 20 Cal.4th at p. 1089; *France v. Superior Court* (1927) 201 Cal. 122, 128 [the rule prevents the collision of courts and contests over jurisdiction over an action].) If a trial court retains authority to dismiss a cause under section 1385 during the pendency of an appeal, exercise of that authority would render an appeal futile. In effect, Martinez's exception to the jurisdictional rule—for a dismissal under section 1385 during a probation period—would permit a trial court to nullify the appellate court's jurisdiction with the dismissal of the case.

In concluding the trial court did not have jurisdiction to dismiss Martinez's case while his appeal was pending, the appellate division quoted from *Nelms, supra*, 165 Cal.App.4th 1465, a case we also find instructive. In *Nelms*, while the defendant's case was pending on appeal, the trial court recalled the sentence under section 1170, subdivision (d), and then granted the defendant's motion to dismiss one of his convictions. (*Nelms*, at p. 1468.) On appeal, both parties contended the trial court's ability to recall the sentence under section 1170, subdivision (d), also gave the court the authority to dismiss the conviction. (*Nelms*, at p. 1472.) The Court of Appeal disagreed, concluding "the trial court had no jurisdiction to dismiss the . . . count" while the case was on appeal, even if the parties agreed to the dismissal. (*Id.* at p. 1473.) The *Nelms* court explained, "[S]ection 1170, subdivision (d), is limited to sentencing and says nothing about modifying the judgment." (*Id.* at p. 1472.) While the statute authorizes a trial court to recall a sentence and resentence a defendant within 120 days of his commitment, it does "not give the court authority to modify the judgment of conviction." (*Ibid.*) Finding the trial court lacked subject matter jurisdiction when it dismissed the count, the *Nelms* court vacated the dismissal. (*Id.* at p. 1474.) The court explained, "[T]he dismissal was of no force and effect" (*id.* at p. 1471) and the matter remained as it was when *Nelms* filed his notice of appeal (*id.* at p. 1473; see *People v. Espinosa* (2014) 229 Cal.App.4th 1487, 1496-1500 [§ 1170, subd. (d) did not give the trial court jurisdiction to modify the verdict by reducing the degree of a conviction after a notice of appeal was filed]).

While section 1170, subdivision (d) gives the court a limited time to recall the sentence of an imprisoned defendant and resentence him, it does not give the court jurisdiction to dismiss or modify a conviction after a notice of appeal has been filed. (*Nelms, supra*, 165 Cal.App.4th at p. 1473; *People v. Espinosa, supra*, 229 Cal.App.4th at p. 1498.) Similarly, after a defendant is convicted and placed on probation, the trial court has the authority under sections 1203.2 and 1203.3 to modify and terminate

probation, but the court does not have jurisdiction under section 1385 to dismiss the case while an appeal is pending.

We conclude the appellate division correctly instructed the trial court to vacate its judgment of dismissal because the trial court lacked jurisdiction to dismiss the case while Martinez's appeal was pending.

The appellate division's order was not unfair to Martinez.

Martinez contends the appellate division's order to vacate the dismissal and the reinstatement of his conviction after it had been dismissed for one year was unfair and "amounts to cruel and unusual punishment." Martinez relies on *People v. Tanner* (1979) 24 Cal.3d 514 (*Tanner*) to support his contention. In *Tanner*, the defendant was granted probation and ordered to serve one year in county jail after the trial court struck a gun use finding. (*Id.* at p. 518, fn. 1.) The Supreme Court, however, concluded, "[T]he trial court erred in striking the use finding and sending defendant to county jail rather than to prison." (*Id.* at p. 521.) It then considered whether it would be unfair to require the defendant to serve his sentence in prison after he had complied with the conditions of his probation, including serving his county jail term. (*Id.* at pp. 521-522.) Relying on a Fifth Circuit Court of Appeals' decision, which was later vacated (*People v. Statum* (2002) 28 Cal.4th 682, 695), the Supreme Court concluded a second incarceration would be "unjust." (*Tanner*, at p. 522.) Subsequent Court of Appeal decisions have "limited *Tanner* to circumstances in which (1) the defendant has successfully completed an unauthorized grant of probation; (2) the defendant has returned to a law-abiding and productive life; and (3) 'unusual circumstances' generate a 'unique element' of sympathy, such that returning the defendant to jail 'would be more than usually painful or 'unfair.'"" (*Statum, supra*, at pp. 696-697, fn. 5.)

Our Supreme Court has since questioned the correctness of *Tanner*, explaining that "[s]ince *Tanner* was decided, we have never relied on it to pretermite the

correction of a sentence that was illegally or improperly imposed.” (*People v. Clancey* (2013) 56 Cal.4th 562, 585; accord, *People v. Statum, supra*, 28 Cal.4th at p. 696.) In both *Clancey* and *Statum*, the Supreme Court found it unnecessary to determine “whether *Tanner* remains good law” (*Clancey*, at p. 586) because the defendant in each case could not satisfy the three-pronged *Tanner* test. (*Ibid.*; accord, *Statum*, at pp. 696-697 & fn. 5.)

We reach a similar conclusion as Martinez cannot satisfy the *Tanner* test. Martinez fails to satisfy the first prong as he was not erroneously granted probation nor did he successfully complete his probation term before the court dismissed his conviction. Martinez had completed only eight months of his three-year probation term when the trial court granted his motion for dismissal, and the record does not indicate that he had completed all of his probation terms, specifically the CalTrans requirement, during that time period.

Concerning the second *Tanner* requirement, Martinez asserts “[w]hile on probation and after the charge against him was dismissed, he did not acquire any violations.” While this is to be commended, remaining law-abiding for a period of 20 months is not a monumental achievement. Moreover, unlike the situation in *Tanner* and *People v. Lockridge* (1993) 12 Cal.App.4th 1752, upon which he relies, Martinez did not face incarceration as a result of the appellate division’s ruling. The appellate division’s order directing the trial court to vacate its judgment of dismissal did not subject Martinez to a first or “second incarceration.” (*Tanner, supra*, 24 Cal.3d at p. 522.) The appellate division’s order only reinstated Martinez’s conviction and his probationary term.

As to the final prong, Martinez asserts that reinstating his conviction was unfair. We see no unfairness in the appellate division’s order instructing the trial court to vacate the erroneous dismissal granted at Martinez’s request. Unlike the situation in *Lockridge* where the trial court explained its reasons for modifying the defendant’s sentence from a prison term to probation (*People v. Lockridge, supra*, 12 Cal.App.4th at p. 1756), here, no explanation has been given as to why the trial court dismissed

Martinez’s conviction. The record does not reflect any “unusual circumstances generating some unique element of sympathy for the defendant’s plight” (*Id.* at p. 1759.)

In sum, Martinez has not established that he is entitled to extraordinary relief.

DISPOSITION

The order to show cause is discharged and the petition is denied.

IKOLA, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

GOETHALS, J.